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No. 90-430

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1990

PAULETTE SHELTON,
Petitioner,

vs.

GREATER CLEVELAND REGIONAL TRANSIT
AUTHORITY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the courts below holding that Ohio's version of the common law public duty doctrine bars imposition of *liability* against the Greater Cleveland Regional Transit Authority, constitutes an adequate and independent state ground which forecloses review by this Court of asserted constitutional infirmities in a statute pertaining solely to *damages*?

2. Whether the petition for certiorari presents an actual case or controversy where the decision below held that under state law no liability exists, and the petition seeks review of damages issues only?

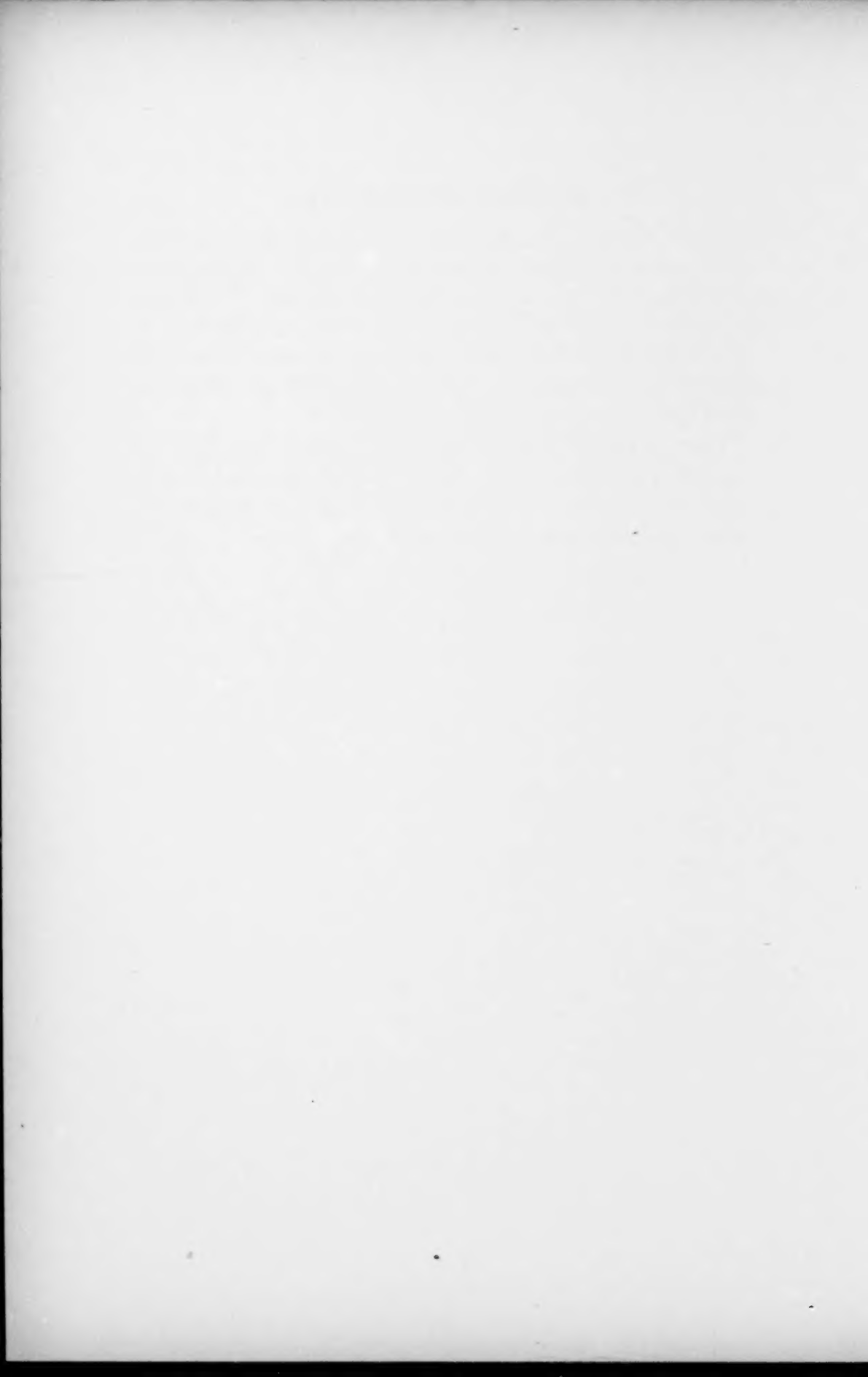


TABLE OF CONTENTS

QUESTIONS PRESENTED	i
OPINIONS BELOW	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	5
The decision below rests upon an independent and adequate state ground	6
The issues posited by the petition for certiorari are moot and would require rendition of an advisory opinion.	7
CONCLUSION	8
APPENDIX A:	
Ohio Revised Code, §306.31	A1
APPENDIX B:	
Ohio Rules of Appellate Procedure, Rule 12	A2

TABLE OF AUTHORITIES

Cases:

<i>Berea College v. Kentucky</i> , 211 U.S. 45 (1908)	6,7
<i>Eilenbecker v. Plymouth County</i> , 134 U.S. 31 (1890) . .	5
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945).	6
<i>Lumbermen's Alliance v. American Excelsior Corp.</i> , 33 Ohio St. 2d 37, 294 N.E.2d 224 (1973)	7
<i>Murphy v. Hunt</i> , 455 U.S. 478 (1982)	7
<i>North Carolina v. Rice</i> , 404 U.S. 244 (1971)	7
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).	7
<i>Sawicki v. Village of Ottawa Hills</i> , 37 Ohio St. 3d 222, 525 N.E.2d 468 (1988).	3,4
<i>Shelton v. Greater Cleveland Regional Transit Authority</i> , 52 Ohio St. 3d 701, 556 N.E.2d 525 (1990).	4
<i>Smith v. Jagers</i> , 33 Ohio St. 2d 1, 292 N.E.2d 641 (1973).	7
<i>Weiner v. Metropolitan Transit Authority</i> , 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982).	4
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977).	6

Constitutional Provisions, Statutes and Rules:

U.S. Const. art. III	7
Ohio Revised Code §306.31	3
Ohio Revised Code §2744.05(C).	4,5,6,7
Ohio Rules of Appellate Procedure, Rule 12(A).	7

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Greater Cleveland Regional Transit Authority, respectfully requests this Court deny the petition for writ of certiorari, seeking review of the Ohio Supreme Court's decision in this case.

OPINIONS BELOW

The order of the Ohio Supreme Court entered on June 13, 1990, *sua sponte* dismissing petitioner Paulette Shelton's appeal for want of a substantial constitutional question is reported at 52 Ohio St. 3d 701, 556 N.E.2d 525 (table decision), and is reproduced in the Appendix to the petition for certiorari ("Pet. App.") at 1a. The decision of the Ohio Eighth District Court of Appeals reversing the jury verdict in favor of petitioner Shelton, and entering judgment in favor of respondent Greater Cleveland Regional Transit Authority, is unreported and is set forth at Pet. App. 2a-26a.

STATEMENT OF THE CASE

Petitioner Paulette Shelton, a 33-year old mother of two, was raped by a teen-aged assailant in a parking lot owned by the Greater Cleveland Regional Transit Authority ("RTA") after she exited the Rapid Transit station at Superior Avenue in Cleveland, Ohio.¹ She sued both her assailant and RTA for the injuries she sustained, claiming that RTA management had been negligent in (a) allocating only \$1.1 million for security purposes out of a total budget of \$125 million, (b) failing to hire and deploy a sufficient number of police officers to police RTA property, (c) refusing to spend money for video cameras at its train stations, (d) relying upon Cleveland Police Department facilities for fingerprinting, booking and incarcerating prisoners, rather than establishing its own, and (e) relying upon lights owned and maintained by Cleveland Electric Illuminating Company rather than installing its own lights in its parking lots. (Trial Transcript at 552-57.) A jury awarded petitioner Shelton \$750,000 in damages.

On appeal, the Ohio Eighth District Court of Appeals reversed the jury verdict and entered judgment in favor of RTA, on the ground that, under the common law public duty doctrine as interpreted by the Ohio courts, *see Sawicki v. Village of Ottawa Hills*, 37 Ohio St. 3d 222, 525 N.E.2d 468 (1988), RTA had no duty to protect petitioner Shelton from attack by a third party

¹ RTA is a governmental entity which, pursuant to statute, is classified as "a political subdivision of the state and a body corporate with all the powers of a corporation..." Ohio Rev. Code Ann. §306.31 (Anderson 1987) (reproduced in Appendix A to this Brief). In addition to maintaining and operating a traditional bus system, RTA also maintains and operates a city-wide rail system termed the "Rapid Transit." Petitioner Shelton was a passenger on the Rapid Transit on the night in question and was raped on RTA property shortly after she detained.

assailant. (Pet. App. 14a-17a.)³ Expressly noting that its "disposition of this assigned error effectively decides these appeals" (Pet. App. 17a), the court of appeals nevertheless "briefly address[ed] the remaining assignments of error submitted by both parties." *Id.* One of the issues so addressed was RTA's claim that the trial court erred in failing to order partial remittitur of the \$750,000 jury award in accordance with Ohio Rev. Code Ann. §2744.05(C) (Anderson 1987), which limits damages in actions against political subdivisions to \$250,000 for non-economic injuries. Disagreeing with the trial court on this issue, the Court of Appeals found that the statute was constitutional and that, absent its ruling that the public duty doctrine barred imposition of liability against RTA, the statute would have to be applied to reduce the jury's \$750,000 verdict. (Pet. App. 19a-23a.) The Ohio Supreme Court *sua sponte* dismissed petitioner Shelton's appeal for lack of a substantial constitutional issue. *Shelton v. Greater Cleveland Regional Transit Authority*, 52 Ohio St. 3d 701, 556 N.E.2d 525 (1990). Petitioner now seeks review by writ of certiorari in this Court, raising issues which pertain solely to the validity of Ohio Rev. Code Ann. §2744.05(C) and the amount of damages she might be entitled to recover thereunder if liability against RTA were not barred by the public duty doctrine.

³ The public duty doctrine, which is derived from English common law and followed in numerous jurisdictions, holds that no civil liability arises from a governmental entity's failure to provide adequate police protection, since the duty to provide such services is one owed to the public in general rather than to any particular individual. *Sawicki*, 37 Ohio St. 3d at 231; *Weiner v. Metropolitan Transit Authority*, 55 N.Y.2d 175, 433 N.E.2d 124 (1982). Although the doctrine rests on several public policy rationales, the one "most often asserted" is that

because the available public resources are limited by the resources possessed by the community, the deployment of them must remain in the realm of policy decision. Obviously there are insufficient police resources to meet every need, particularly in high crime areas and during times of higher crime rates. Police departments must be able to prioritize and create responses without the benefit of hindsight.

REASONS FOR DENYING THE WRIT

Review by writ of certiorari is barred by two insurmountable obstacles in this case: (1) the decision of the Ohio courts rests upon an independent and adequate state ground, and (2) the issues posited by the petition for certiorari are moot and would require this Court to render a purely advisory opinion.

The sole issues presented by the petition for certiorari are issues pertaining to the constitutionality of Ohio Rev. Code Ann. §2744.05(C) which limits to \$250,000 the amount of damages that can be recovered in a tort action against an Ohio political subdivision for non-economic loss. Petitioner Shelton claims that this damages cap violates due process and equal protection, constitutes a taking of property without just compensation in violation of the Fifth Amendment, and infringes upon her right to a jury trial in violation of the Seventh Amendment. Even if these contentions did have arguable merit,³ they are not properly before this Court because the decision of the Ohio courts vacating the \$750,000 jury award, and entering judgment in favor of RTA, in no way rests upon §2744.05(C).

The jury verdict awarding petitioner Shelton \$750,000 in damages was vacated *not* because it exceeded the \$250,000 cap imposed by §2744.05(C), but because the Court of Appeals determined that imposition of liability against RTA on the facts presented by

³ Petitioner's due process and equal protection attacks upon Ohio Rev. Code Ann. §2744.05(C) were properly rejected by the courts below, for the reasons set forth in the court of appeals' decision. See Pet. App. 19a-23a. Her Seventh Amendment attack, asserted for the first time in this Court, is frivolous on its face since the Seventh Amendment's guarantee of a right to a jury trial is not applicable to state court civil proceedings. *Eilenbecker v. Plymouth County*, 134 U.S. 31 (1890).

petitioner would violate the public duty doctrine. Noting that petitioner's claim of negligence amounted to nothing more than disagreement with discretionary, budgetary decisions made by RTA management regarding funding of RTA security operations, the Court of Appeals held that

to permit liability on this basis would invite an assault upon the public coffers. Every governmental body faces budgetary restrictions and few can afford to fund "ideal" security operations. Liability cannot be predicated upon the legislative and administrative allocations of scarce resources to security needs.

Pet. App. at 16a. Leaving no ambiguity regarding the basis for its decision, the Court of Appeals went on to state, "we reverse the trial court's judgment *on this basis* and order a final judgment for the transit authority on the plaintiff's claim." Pet. App. at 17a (emphasis added). The Ohio Supreme Court *sua sponte* denied review on the ground that the case presented no substantial constitutional issue.

These factors clearly show that the decision below rests upon an adequate and independent state ground, namely the common law public duty rule as interpreted by the Ohio courts in determining tort liability of its political subdivisions. This Court therefore lacks jurisdiction to review the judgment below. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-67 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

The fact that the Court of Appeals did "briefly address" issues concerning the constitutionality of Ohio Rev. Code Ann. §2744.05(C)'s damages cap provision does not alter the fact that its decision rests on a non-federal ground. *Berea College v. Kentucky*, 211 U.S. 45,

53 (1908). Its comments regarding §2744.05(C) and damages related issues are pure dictum, and that portion of its decision addressing these matters is purely advisory in nature.

Ohio's unique procedural rules in some instances require Ohio's intermediate appellate courts to render advisory opinions on moot issues.⁴ The rule is otherwise in this Court since U.S. Const. art. III limits this Court's jurisdiction to actual cases or controversies, thereby barring consideration of moot issues and the rendition of advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969). Since petitioner Shelton lost on the issue of liability, the issues she seeks to raise relating to damages are moot. *Murphy v. Hunt*, 455 U.S. 478 (1982) (sex offender's claim that state statute denying pretrial bail was unconstitutional became moot upon conviction for underlying offense). This Court therefore lacks jurisdiction to consider her claims.

⁴ Rule 12(A) of the Ohio Rules of Appellate Procedure (reproduced in full in Appendix B to this Brief) provides that "[a]ll errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error." Ohio R. App. P. 12(A). This requires Ohio's intermediate appellate courts to address each issue raised by the parties even where, as here, the court's decision on one issue renders other issues moot. See *Lumbermen's Alliance v. American Excelsior Corp.*, 33 Ohio St.2d 37, 294 N.E.2d 224 (1973); *Smith v. Jagers*, 33 Ohio St. 2d 1, 292 N.E. 2d 641 (1973).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A-

Ohio Revised Code

§306.31 Creation of authority.

A regional transit authority may be created in the manner provided in section 306.32 of the Revised Code, for any one or more of the following purposes: acquiring, constructing, operating, maintaining, replacing, improving, and extending transit facilities; controlling and administering the public utilities franchise of such transit facilities; entering into and supervising franchise agreements; accepting assignment of and then supervising an existing franchise agreement; and accepting assignment of and exercising a right to purchase a transit system in accordance with the acquisition terms of an existing franchise agreement. A regional transit authority so created is a political subdivision of the state and a body corporate with all the powers of a corporation, comprised of the territory of one, or two or more counties, municipal corporations, townships, or any combination thereof, provided, that each county, municipal corporation, or township included within a regional transit authority shall be a county which is, or be located in a county which is or is contiguous to a county which is, or in which a municipal corporation or township is located which is, included in such regional transit authority.

APPENDIX B

Ohio Rules of Appellate Procedure

RULE 12. DETERMINATION AND JUDGMENT
ON APPEAL

(A) **Determination.** In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error.

* * *

